


[PPP Home](#) | [Contact Us](#)

PPP Agreements

Transaction Being Analyzed: Chicago Skyway Concession and Lease Agreement

[« back](#)

KEY ELEMENTS OF PUBLIC PRIVATE PARTNERSHIP ("PPP") AGREEMENTS

Last Updated: September 2005

No.	Key Element/Legal Issue:	Response/Suggested Model Provision:
1.	Type of PPP agreement: a. Design-Build-Operate-Maintain b. Pre-Development Agreement c. Concession - Investor Financed d. Concession - Tax-exempt Financed e. Other _____	Concession - Investor Financed.
2.	Agreement resulted from: a. Unsolicited proposal and negotiations b. Competitive procurement following unsolicited proposal c. Competitive procurement d. Sole-source negotiations e. Other _____	Competitive bid process used; process was similar to a corporate auction.
3.	What is the title and date of the primary PPP agreement? Who are the parties to that agreement? What is the form of the private entity (e.g., corporation, LLP, LLC, partnership or joint venture)? If a joint venture, is there joint and several liability? Are the obligations of the private entity guaranteed by one or more third parties (other than sureties)?	The Chicago Skyway Concession and Lease Agreement made and entered into October 27, 2005, by and between the City of Chicago and Skyway Concession Company, LLC. Limited liability company. No. Bid was secured by a \$55 million letter of credit. Upon signing, the private investor's obligation to close on the agreement within 180 days was secured by a letter of credit in the amount of 5% of the rent payable at closing.
4.	Does the PPP agreement contemplate a subsequent assignment of the private entity's rights to another entity, such as a non-profit corporation to be formed for the purpose of financing the project?	No.

5.	Describe conditions applicable to the financing plan (types, sources, and covenants of capital financing).	Financing of the rent payment is the responsibility of the Concessionaire (the private investor), subject only to the City of Chicago's representations and warranties continuing to be true and correct, no default by City, no law passed making the transaction illegal, and no injunction.
6.	What other major ancillary agreements are there? Are other agreements contemplated to be executed in the future (e.g., such agreements might include a design-build contract, a concession agreement, a full or partial completion guaranty and/or financing agreements)?	None. However, Schedule 3 to the Agreement contains detailed operating standards.
7.	What are the roles of the public and private entities for pre-financing tasks, such as project definition, preparation of environmental documents, permitting, traffic and revenue studies, surveys, geotechnical investigations, right-of-way acquisition and preliminary engineering, public involvement?	City made certain information relating to the Skyway available to bidders during the due diligence period.
8.	How is the private entity to be compensated for pre-financing costs (e.g., current reimbursement, reimbursement from financing proceeds, development fee, return-on-equity contribution)?	N/A. No part of the several bidders' bid preparation costs was born by City.
9.	How is the private entity to be compensated for its equity and debt contributions? How is the private entity to be compensated for post-financing design, acquisition, permitting, construction, and related services? How is the private entity to be compensated for operation and maintenance services?	The Concessionaire has the right to toll revenues during the 99-year lease period, subject to detailed toll regulations. There is no express limit on the Concessionaire's rate of return.
10.	Is the public entity required to exercise its power of eminent domain to facilitate the transportation facility?	N/A.
11.	Does the public entity establish the design, construction, operation and maintenance standards with which the private entity must comply?	Yes. There are detailed operating standards to assure safety in operations and high engineering standards during the term of the lease. These standards are included as a schedule to the Agreement.
12.	Describe any payment due from the private entity to the public entity for the grant of rights.	\$1.83 billion, payable at closing. The original bid was \$1.82 billion, but this amount increased under an inflation formula by the time the Chicago City Council approved the agreement.
13.	What is the mechanism by which user fees, if any, are established and adjusted? Describe any limitations or user fees and exempt vehicles.	Maximum toll rates are limited by schedule through January 1, 2017. Thereafter, rates can increase annually by the greater of inflation (CPI) or the increase in per capita gross domestic product, with a minimum guaranteed increase of 2% per annum.
14.	Describe any revenue recovery between the public and private entities.	Concessionaire has the right to all toll revenues and revenues from the lease of a restaurant. City has right to all other revenues, including the sale of naming rights and the installation of utilities and billboards.
15.	What is the duration of the agreement and what are the options to extend this timeframe (if applicable)?	99 years. No renewal provision. Term can be extended to provide compensation for an event of Force Majeure.

16.	What are the major performance milestones that will be required of the parties, including the public entity and the private entity?	Payment of Rent at Closing, which must occur within 90 days of the signing of the Agreement (this deal closed on 1/24/05 when City received a wire transfer for \$1.83 billion).
17.	Describe measures of compensation upon termination for convenience.	City has no right to terminate for convenience. However, payment of compensation to Concessionaire must be made if an "Adverse Action" occurs, defined as an action by the City, Cook County or the State of Illinois (or any subdivision or agency of any of the foregoing, including enacting any Law) the effect of which is reasonably expected (i) to be principally borne by the Concessionaire and (ii) to have a material adverse effect on the fair market value of the Concessionaire Interest. Importantly, the development of competing facilities is not an Adverse Action. Concessionaire can terminate the agreement and be paid the fair market value of its concession on the date of any such action. Fair market value will be determined by an independent third party appraiser.
18.	Describe any performance standards, performance warranties, or performance guarantees.	Concessionaire must meet various standards set forth in the agreement, including capital improvements and changes in such standards to (i) comply with any new Law applicable to the Skyway Operations or (ii) conform the Operating Standards to standards or practices generally adopted by other Governmental Authorities in the United States having jurisdiction over Comparable Highways.
19.	If applicable, describe the private entity's rights and obligations to provide future project capacity improvements, extras, or expansions.	Concessionaire can request the right to expand the facility at its own cost, but City can reject this request if the proposed expansion requires additional land. City can require Concessionaire to expand the existing facility at City's cost, plus payment of Concession Compensation, including the actual and estimated net losses of the Concessionaire's present and future Toll Revenues that are reasonably attributable to such action.
20.	Who is responsible for the operation and maintenance of the completed facility?	Concessionaire.
21.	Does the private entity have the right to make and enforce, with the consent of the public owner, reasonable rules with respect to the transportation facility?	Chicago Police Department retains jurisdiction to enforce laws on the Skyway. Maximum tolls and exceptions for public vehicles are set forth in the Tolling Regulation. There are also specific provisions for off-peak truck use. Concessionaire is furthermore entitled to implement electronic tolling on this transportation system.

22.	Describe any provisions relative to competitive transportation facilities (include a description of what constitute competitive facilities, exceptions, and measure of damages).	<p>Significantly, there is no provision! Agreement provides specifically that the following is not an "Adverse Action" requiring compensation to be paid to Concessionaire:</p> <p>the development, redevelopment, construction, maintenance, modification or change in the operation of any existing or new mode of transportation (including a road, street or highway) that results in the reduction of Toll Revenues or in the number of vehicles using the Skyway Toll Bridge.</p>
23.	Is the private entity required to reimburse the public entity for services? For design review? Permitting? Operation and maintenance? Policing?	<p>Concessionaire is required to reimburse City for its costs of policing the Skyway. § 3.16</p> <p>Concessionaire is required to reimburse the City for all costs and expenses reasonably incurred by the City during the Term (including employment costs and related overhead expenses allocable thereto, as reasonably determined by the City based on the time expended by the employees who render such services to the City) in monitoring the Skyway Operations and the Concessionaire's compliance with its obligations and duties under the Agreement (including any Audits, tests, reviews or exams of the Skyway, the Skyway Operations (or any part thereof), any information or the proposals, requests, procedures, certificates, plans, drawings, specifications, contracts, agreements, schedules, reports, lists or other instruments of the Concessionaire or its Representatives); <i>provided, however</i>, that the aggregate amount payable by the Concessionaire pursuant to this provisions shall not exceed \$165,000 per calendar year, Adjusted for Inflation.</p>

24.	If applicable, what is the reasonable/maximum return or rate of return on investment authorized for the developer/operator to earn, the formula by which such rate of return will be calculated and the distribution of project revenues?	No rate of return is established in the agreement.
25.	What events constitute developer/operator defaults, and what are the major remedies available to the public owner?	Defaults include the failure to perform any term or condition of the agreement, a transfer of Concessionaire's interest in the agreement in violation of restrictions on transfer, the failure to comply with a final award for a matter submitted to dispute resolution, events of bankruptcy and levy under execution or attachment against the Skyway. Remedies include Termination (limited for failure to comply with Operating Standards), cure, at the cost of Concessionaire, specific performance, closure of the Skyway or exercise of any other remedies available at law or equity to City.
26.	What other rights does the public entity have to terminate the agreement (e.g., failure to meet milestones, termination for convenience)? If the agreement is terminated for convenience, what compensation is paid to the private entity?	See above.
27.	What events constitute public entity defaults, and what are the remedies available to the developer/operator?	Defaults include failure to comply with the material conditions of the agreement (other than Adverse Action), failure to comply with a final arbitration award, levy under execution or attachment resulting from encumbrance created by City, or a voluntary act of bankruptcy. Remedies include termination of the agreement, exercise of rights or remedies available at law or equity and the ability to seek to recover Losses.
28.	What are the lender's rights and remedies with respect to private entity defaults? Does the agreement provide for lender's rights and remedies?	Right to cure Concessionaire default for 30 days beyond any cure period applicable to Concessionaire. Leasehold Mortgagee can foreclose on lease and transfer Concessionaire's interest, subject to limitations on qualifications of transferee. City has right to purchase Leasehold Mortgage.
29.	How is the performance of the private entity secured (e.g., surety bonds, letters of credit or third party guarantees)?	Ten years prior to the end of the Term, Concessionaire must provide a letter of credit in an amount equal to the highest gross revenues received in the prior 10 years. The purpose of this requirement is to insure that Concessionaire continues to maintain the Skyway before it is returned to City at the end of the 99-year lease.

30.	<p>What indemnification obligations do each of the parties have?</p>	<p>Concessionaire indemnifies City against losses due to (i) any failure by it to perform any of its obligations under the agreement or, any breach by the Concessionaire of its representations or warranties, (ii) any Assumed Liabilities, (iii) any tax or mortgage recording charge attributable to any Transfer of the Concessionaire Interest or any part thereof or (iv) any claim for brokerage commissions, by any Person who acted on behalf of the Concessionaire in connection with this agreement, any Transfer of the Concessionaire Interest or any part thereof or any other matter affecting the Skyway.</p> <p>City indemnifies Concessionaire for losses due to (i) any failure by it to perform any of its obligations under the agreement or, any breach by the City of its representations or warranties, (ii) any Excluded Liabilities, or (iii) any claim for brokerage commissions, by any Person who acted on behalf of the Concessionaire in connection with the Agreement. "Excluded Liabilities" include debts, liabilities and obligations (i) with respect to the City's obligations under the agreement, (ii) arising out of Skyway Operations prior to the Time of Closing, (iii) under any Environmental Law arising out of or relating to the ownership, operation or condition of the Skyway at any time prior to the Time of Closing or any Hazardous Substance or other contaminant that was present on the Skyway Land or otherwise existed at any time prior to the Time of Closing and (iv) incurred by the City under or in connection with certain ongoing contracts construction and engineering contracts.</p>
31.	<p>What are the obligations of the developer/operator to maintain records, to allow inspection and audit and to provide regular reports to the public owner?</p> <p>What obligation does the public entity have to maintain the confidentiality of specified information?</p>	<p>Concessionaire must provide quarterly traffic reports and forecasts.</p> <p>Upon request of City, Concessionaire must provide all information relating to Skyway operations, including income statements, details regarding Skyway revenues, capital expenditures, certificates, correspondence, etc.</p> <p>City has full rights of audit, inspection and review.</p> <p>City is required to keep confidential any Information obtained from the Concessionaire that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential, or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire in writing to the City.</p>

32.	<p>What are the conditions under which the private entity may assign its rights under the PPP agreement and/or its rights to the transportation facility?</p> <p>Can it assign its rights to a non-profit or other entity for purposes of financing?</p> <p>Can it make an assignment for security?</p> <p>Can it transfer its rights and obligations to an affiliate or unrelated third party? What are the conditions, if any, to obtain the consent of the government entity?</p>	<p>Concessionaire is barred from transferring its interest in the Concession within 3 years of Closing. Thereafter, it can only transfer its interest with the consent of the City, which may be based on the City's determination of : (i) the financial strength and integrity of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates; (ii) the capitalization of the proposed Transferee; (iii) the experience of the proposed Transferee or the Operator to be engaged by the proposed Transferee in operating toll roads or highways and performing other projects; (iv) the background and reputation of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory claims or actions against any such Person and the quality of any such Person's past or present performance on other projects); and (v) the Operator engaged by the proposed Transferee.</p> <p>Concessionaire may make an assignment of its interest to a Leasehold Mortgagee.</p>
33.	Describe lender protection provisions (if any).	See above.
34.	What dispute resolution mechanisms are provided for?	The agreement provides for informal dispute resolution, mediation and arbitration. Technical issues may be subject to resolution by an engineering expert.
35.	Describe any provisions regarding high-occupancy toll lanes or variable pricing.	HOV lanes and variable pricing are permitted by the agreement. The agreement also establishes lower toll rates during night hours for trucks.
36.	Describe any provisions or HOV policy (if applicable).	None.
37.	Describe any provisions limiting liability or waiving consequential damages.	Liability for Losses excludes consequential damages.
38.	Describe any public subsidy of revenues (e.g. shadow tolls, assumption of operation and maintenance costs).	None.

[back to top](#)

PPPS Defined | PPP Options | PPP Legislation | SEP-15 Program | PPP Case Studies | Links | Resources
Events Calendar | Contact Us | Glossary

[FHWA Home](#) | [Feedback](#)

FHWA

United States Department of Transportation - **Federal Highway Administration**